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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ISRAEL VAZQUEZ-CALDERON,<br>Defendant and Appellant. | A151643<br><br>(Contra Costa County<br>Super. Ct. No. 51613446) |

A jury convicted defendant Israel Vazquez-Calderon of committing 24 felony sexual offenses against his stepdaughter, Jane Doe (Jane) over a ten-year period, starting when she was six years old. He was sentenced to 200 years to life in prison. On appeal, defendant claims his sentence constitutes cruel and/or unusual punishment under the federal and state constitutions. We disagree and affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Jane was born in Mexico in summer 1999. She lived in Mexico with her grandmother while her mother immigrated to the United States. She came to California shortly before her sixth birthday and moved to San Pablo, where she began living with her mother, her newborn half-brother, and her mother's new husband, defendant herein. Over the next ten years, the family moved numerous times. During this time period, Jane's mother and defendant had two more children, both daughters.

### *A. Defendant's Sexual Offenses Against Jane*

While Jane was six years old and living in San Pablo, defendant began to make her feel "uncomfortable." Previously, Jane had helped her mother massage defendant's feet and shoulders. On one occasion, however, when Jane's mother was not present, defendant suggested that she massage him while they were both naked. Defendant assured Jane that this behavior was "totally normal." Defendant got undressed and told Jane to take off her clothes and start massaging his feet, legs, and "private parts" with lotion. Jane thought this was a "little weird" because she had never seen a naked man. During the massage, which lasted 20 minutes, defendant did not have an erection.

Less than a month later, while Jane's mother was at work, defendant told Jane that he would massage her. Defendant and Jane disrobed in defendant's bedroom. Defendant and Jane rubbed each other's private parts with lotion. During this massage, which lasted less than 20 minutes, defendant did not achieve an erection.

The "massages" became regular events, occurring about three times a week when Jane's mother worked at night. At some point, "out of nowhere it was no longer hands and it was just lips and tongue." Defendant began to kiss Jane's vagina and breasts; she placed her lips and tongue on his penis. This activity occurred once or twice a week, less frequently than the massages. Defendant placed his mouth on Jane's genitals more often than he placed his penis in her mouth.

Typically, when Jane's mother was at work and Jane's brother was watching television in the living room, defendant and Jane would move into a bedroom. In the bedroom, defendant and Jane massaged each other, disrobed, and touched each other's body parts. The touching soon "escalated" to oral sex.

The family lived in San Pablo and Richmond from the time Jane entered the first grade until she was in the fourth grade, when they moved to Vacaville. During this period, defendant placed his mouth on her vagina twice a week; he put his penis in her mouth "at least three times a month." Defendant had an erection during oral sex on at least one occasion while the family lived in San Pablo. Jane saw defendant ejaculate

during masturbation. While living in San Pablo, defendant used his penis to "play[] around" with Jane's vagina; he did not insert his penis at that time.

The same activity continued when the family moved to Richmond. The massages and oral sex occurred weekly. If defendant became busy at work, the activity ceased, but for no longer than a week. Defendant placed his mouth on her vagina two or three times a week. He placed his penis in her mouth about five times a month, a number that increased as she matured and progressed toward middle school. He did not sodomize her or have vaginal intercourse in San Pablo or Richmond.

During the time the family lived in San Pablo and Richmond, Jane massaged defendant's penis more than 50 times. He placed his mouth on her vagina "probably" more than 20 times and placed his penis in her mouth more than five times a month.

When the family moved to Vacaville, the sexual activity continued and became more frequent. Defendant encouraged Jane to compete with her mother in the nature of sexual activity. Defendant sodomized Jane, which "hurt pretty bad." When Jane cried out in pain, telling defendant to stop, he said, "It's okay. Don't worry. It hurts because you are small." Jane said it felt "weird" when defendant ejaculated in her anus.

The frequency of defendant's oral copulation of Jane's vagina in Vacaville was comparable to that which occurred in Richmond, but Jane's oral copulation of defendant's penis increased. In the year that the family lived in Vacaville, defendant placed his penis in Jane's mouth five to 10 times and placed his mouth on Jane's vagina more than 20 times.

Defendant initiated other sexual activities, such as rubbing his penis between the labia of Jane's vagina. Jane likened it to rubbing the "hot dog on the bun." Jane estimated that defendant rubbed his penis against her bare vagina more than 20 times. Jane did not tell her mother about the sexual activity, because defendant had made her mother happy. Jane's "number-one" priority was to make her mother happy, at "whatever . . . cost" necessary.

The family moved to Pittsburg from Vacaville after Jane completed the first semester of the fifth grade. The sexual activity between defendant and Jane continued.

The frequency with which defendant placed his penis in Jane's mouth increased. It appeared to Jane to be his "favorite thing."

When the family lived in their first apartment in Pittsburg, defendant told Jane that he preferred to penetrate her vagina, not her anus, with his penis, but Jane refused. Defendant began to place his fingers into Jane's anus and vagina. Jane estimated that the digital penetration occurred three to four times each month. Defendant placed his mouth on her vagina two to three times a week and placed his penis in her mouth three times a week. Defendant usually ejaculated after the various sex acts.

After the seventh grade, Jane began to realize that "this was not okay," a realization that prompted defendant to apologize to her after each sex act. She believed he apologized more than 100 times. Defendant became increasingly jealous, forbidding Jane to have male friends and checking her text messages. Jane became increasingly resistant to defendant's physical advances, causing him to withhold privileges. He promised to stop forcing her to have sex if she accepted baptism; she complied, but he continued to have sex with her. When Jane was in the eighth grade, Jane defended herself by biting defendant's penis.

While the family lived in in Pittsburg, defendant separated from Jane's mother and moved to an apartment in Antioch. Jane and her half-siblings visited defendant in his apartment. While the siblings were diverted, defendant would force Jane to perform the "same routine."

After a six-month separation, defendant and Jane's mother got back together, and the family moved into an apartment in Antioch. During this time, defendant rubbed his penis on Jane's labia, buttocks, between her breasts—"anything he could." Those acts "happened often."

By the time Jane entered the eighth grade, she had seen defendant ejaculate hundreds of times. Typically, he discharged on her breasts, back, and stomach. Defendant ejaculated on Jane's face for the first time when she was in the eighth grade. He wanted to ejaculate in her mouth, but she refused. She was "grossed out" by masturbating him until he ejaculated in her hand.

In Jane's freshman year of high school, the family moved to a five-bedroom home in Antioch. Jane had her own bedroom. Defendant would stealthily enter her room while she slept and remove her clothing. When she would awaken, he would hastily cover her and dress himself.

Jane estimated that defendant showed pornography to her "around 10 times." He asked her to send photographs of her breasts, promising her rewards if she did and punishment if she did not.

Jane knew that defendant's conduct toward her was wrong, but she feared telling her mother because she knew the truth would hurt her mother. Jane warned defendant that she would report him to the police, but it did not affect his behavior. She was reluctant to report defendant to the authorities because her siblings would be without a father. Jane began to worry about the safety of her half-sister when she was almost six years old, as this was the age when defendant started abusing her. Jane wanted to be there for her little sister to make sure that she would not have to endure what Jane had gone through. Jane began to hate defendant, despite the gifts and money he gave to her. When she asked why he had abused her, he said that he was tempted by her and he fell in love with her. Jane was "disgusted" by his answer.

Although Jane did not tell her mother about defendant's behavior, fearing the pain it would cause her, she did tell some of her friends. She first told a friend in the sixth grade, and she told other friends in high school.

The last time defendant sexually abused Jane was the evening before November 1, 2015. He came into her room while she was sleeping and "did what he needed to do." She awoke, told him to stop, and she left the room. The following morning, Jane confronted defendant in front of her half-siblings and said that she planned to leave. After more argument, Jane called her mother and one of her friends. Jane's mother, who had separated from defendant again, drove to the house to take Jane to her home. Jane's mother later brought her to the police station.

### *B. Criminal Investigation*

On November 5, 2015, police arrested defendant and interviewed him at the police station. Defendant admitted that he had "touched" Jane "like a woman." He believed that he had started the abuse when she was seven or eight years old. Defendant said that he did not have "100 percent sex" with Jane, but he touched her vagina and buttocks, placed his mouth on her vagina and breasts, and had Jane put his penis in her mouth.

Defendant believed that Jane orally copulated him when she was12 or 13 years old. He admitted that he had ejaculated in her mouth "sometimes." He thought that she was eight or nine years old when he placed his mouth on her vagina. He said that Jane was probably correct that he had placed his penis in her "butt" when she was six and one-half years old. He committed sodomy on her "a couple of times," "maybe five [times]."

Defendant acknowledged that he had shown pornography to Jane and had pictures of Jane in the nude. He also acknowledged that in the beginning of the abuse, Jane said nothing, but when she was 12 or 13 years old, however, Jane began telling defendant to stop.

### *C. The Verdict and Sentencing*

Defendant was charged with 24 felony counts, to wit: 10 counts of a lewd act upon a child under the age of 14 years (Pen. Code,[1] § 288, subd. (a); [counts 1, 2, 3, 4, 13, 14, 19, 20, 21 & 22]); 10 counts of oral copulation or sexual penetration of a child 10 years or younger by a person 18 years or older (§ 288.7, subd. (b); [counts 5, 6, 7, 8, 11, 12, 15, 16, 17 & 18]); two counts of sexual intercourse or sodomy with a child 10 years or younger by a person 18 years older (§ 288.7, subd. (a); [counts 9 & 10]); and two counts of a lewd act upon a child 14 or 15 years of age by a person at least 10 years older than the child (§ 288, subd. (c)(1); [counts 23 & 24].)

The jury convicted him of all charges, and the trial court sentenced him to an indeterminate sentence of 200 years to life in prison, comprising consecutive terms of 15 years to life for each count of oral copulation or sexual penetration of a child age 10 or

[1] All further undesignated statutory references are to the Penal Code.

younger (counts 5, 6, 7, 8, 11, 12, 15, 16, 17 & 18); and consecutive terms of 25 years to life for each count of sexual intercourse or sodomy with a child age 10 or younger (counts 9 & 10). As to the remaining counts, the trial court imposed a determinate sentence of 25 years, four months, calculated as follows: six years for lewd act on a child under 14 (count 1), consecutive terms of two years each for each additional count of lewd acts on a child under 14 (counts 2, 3, 4, 13, 14, 19, 20, 21 & 22); and consecutive terms of eight months for each count of lewd acts on a child 14 or 15 years of age by a person at least ten years older (counts 23 & 24).

## II. DISCUSSION

### *A. Sentencing Scheme*

"Section 288.7 was enacted as part of the Sex Offender Punishment, Control, and Containment Act of 2006 (the Act). [Citation.] . . . The primary purpose of the Act was to prevent 'future victimization' of the community by sex offenders. [Citation.] Among the provisions of the Act was the creation of several new criminal offenses involving child victims"—including a "new offense imposing an indeterminate life sentence for sexual intercourse, sodomy, oral copulation or sexual penetration of 'a child 10 years of age or younger' in section 288.7."[2] (*People v. Cornett* (2012) 53 Cal.4th 1261, 1267.)

Section 288.7, subdivision (a) mandates a sentence of 25 years to life for the crime of sexual intercourse or sodomy with a child who is under 10 years of age or younger. Defendant was convicted of two counts under the statute. Subdivision (b) mandates a sentence of 15 years to life for the crime of oral copulation of a child. Defendant was

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[2] Defendant, citing a law review article entitled *Sex Offender as Scapegoat: The Monstrous Other Within*, contends that laws like section 288.7 have created an unwarranted "moral panic" that has resulted in " 'the creation of a class of persons who are not simply unsympathetic, but are regarded as undeserving of certain legal and moral rights.' " (Douard, Sex Offender As A Scapegoat: The Monstrous Other Within (2008/2009) 53 N.Y.L. Sch. L. Rev., 31, 45.) Defendant's punishment, however, was not the result of any so-called "moral panic" that demonized him in the eyes of the law. Rather, his punishment "reflects the Legislature's *zero tolerance* toward the commission of sexual offenses against particularly vulnerable victims." (*People v. Alvarado* (2001) 87 Cal.App.4th 179, 200–201, italics added.)

convicted of 10 counts under the statute. As such, the sentencing issue before the trial court was whether to impose concurrent or consecutive sentences. (§ 669; Cal. Rules of Court, rule 4.425.)

***B. State and Federal Constitutional Framework***

Defendant contends his indeterminate sentence under section 288.7, subdivisions (a) and (b) constitutes cruel and/or unusual punishment under the federal and state constitutions.[3] The Eighth Amendment of the federal Constitution " 'prohibits the infliction of "cruel and unusual" punishment. [Citation.] Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel or unusual" punishment . . . . The distinction in wording is "purposeful and substantive rather than merely semantic," ' " and we therefore separately construe the two provisions. (*People v. Baker* (2018) 20 Cal.App.5th 711, 723, italics omitted (*Baker*).) Broadly, however, both prohibit punishment that is " ' " 'grossly disproportionate' " ' " to the crime. (*Id.* at p. 732) Whether a sentence constitutes cruel and unusual punishment is a question of law we review de novo. (*Baker, supra,* 20 Cal.App.5th at p. 722.)

***C. California Constitution***

A punishment violates the California Constitution "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410 424 (*Lynch*).) The state constitutional analysis requires a three-pronged approach, under which a court (1) evaluates " 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society,' " (2) "compare[s] the challenged punishment with punishments prescribed for more serious

[3] Although he attempts a facial constitutional challenge, that challenge fails under *In re Rodriguez* (1975) 14 Cal.3d 639, 648. In rejecting a facial challenge to section 288, the court noted that section 288 "encompasses offenses reflecting a wide range of culpability, including situations in which the life maximum may be a constitutionally permissible punishment." (*Id.* at p. 648.) Moreover, defendant repeatedly notes his minimal criminal history and low risk for sex offense recidivism in challenging his sentence. This is therefore an *as applied* challenge—i.e., that the mandatory sentence is cruel and unusual as applied to him. (*Id.* at p. 651.)

crimes in [its] jurisdiction," and (3) "compare[s] the challenged punishment to punishments for the same offense in other jurisdictions." (*People v. Johnson* (2010) 183 Cal.App.4th 253, 296–297.) "The weight afforded to each prong may vary by case," and " '[d]isproportionality need not be established in all three areas.' " (*Baker, supra,* 20 Cal.App.5th at p. 723.)

Reducing a sentence as cruel or unusual "is a solemn power to be exercised sparingly only when, as a matter of law, the Constitution forbids what the sentencing law compels." (*People v. Mora* (1995) 39 Cal.App.4th 607, 615 (*Mora*).) "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) This is not one of those cases.

*1. Nature of the offense and offender*

Factors to consider in evaluating the nature of the offense include the seriousness of the offense and the presence of violence, victims, or aggravating circumstances. (*Lynch, supra,* 8 Cal.3d at pp. 425–426.) We consider not only the offense in the abstract but also the facts of the crime in question—"i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*People v. Dillon* (1983) 34 Cal.3d 441, 479; *People v. Reyes,* 246 Cal.App.4th 62, 87.) We also consider the "strong public policy to protect children of tender years," (*People v. Olsen* (1984) 36 Cal.3d 638, 646) and recognize that "sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people" (*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 244.).

Defendant argues that he had no prior criminal record, that he had a low risk of reoffending, and that Jane was not physically harmed. In *Baker,* the appellate court rejected similar arguments in concluding that the defendant's sentence of 15 years to life for oral copulation with a child 10 years of age or younger under section 288.7, subdivision (b) did not constitute cruel or unusual punishment. (*Baker, supra,*

20 Cal.App.5th at pp. 724–727.) Defendant's lack of criminal history and minimal risk of reoffending, like that of the *Baker* defendant, may weigh in his favor. (*Id.* at p. 725.) But these factors do not outweigh the numerous other aggravating factors in this case.

Jane was particularly vulnerable given her age, and defendant abused a position of trust to commit the offense. (Cal. Rules of Court, rule 4.421(a)(3) & (11); *People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413 [victim's vulnerability and defendant's abuse of trust were aggravating factors for the offense of forcible lewd acts on a child under 14].) Further, defendant sexually abused Jane for years. His conduct was reprehensible. Defendant knew his conduct was wrong, yet he did it anyway, acting in utter disregard for this extremely vulnerable victim. Critically, defendant fails to recognize that he was convicted of not one, but 24 felonies. Addressing defendant at sentencing, the trial court gave weight to the fact that "you had a step-daughter living in your home for 10 years with weekly, repeated[] molesting." This conduct, the trial court concluded, was "cruel . . . callous . . . [and] vicious."

In rejecting the claim of cruel or unusual punishment in *Baker*, the court gave little weight to the fact that an exam of the victim shortly after the offense did not reveal physical injuries, because the defendant " 'did not have to hurt her in order to do permanent psychological damage.' " (*Baker, supra,* 20 Cal.App.5th at p. 725.) It goes without saying that defendant's crimes likely caused psychological harm to Jane, and it is difficult to accept the suggestion that anal sex with such a young child did not involve some degree of physical harm. Indeed, Jane testified that it "hurt pretty bad" when defendant sodomized her.

In sum, under the circumstances, defendant's sentence is not grossly disproportionate to the nature of the offenses and the offender. The reason defendant's sentence is so lengthy is that he committed *multiple* violations of section 288.7, subdivisions (a) and (b), under circumstances evincing numerous aggravating factors.

*2. Comparison of Punishment for Other California Crimes*

Defendant argues the mandatory imposition of an indeterminate life sentence for oral copulation of a child age 10 or younger is "excessively harsh" when compared with the "markedly lesser penalties" for other sex crimes involving children. However, " ' [p]unishment is not cruel or unusual merely because the Legislature may have chosen to permit a lesser punishment for another crime. Leniency as to one charge does not transform a reasonable punishment into one that is cruel or unusual.' " (*Baker, supra,* 20 Cal.App.5th at p. 727.) We recognize that certain other serious sexual crimes against children are not subject to indeterminate sentencing. (*Id.* at pp. 727–728.) But defendant does not explain why the sentence for violations of section 288.7, subdivisions (a) and (b), which involve the youngest victims, is out of line with the sentence for other similar crimes. He therefore fails to convince us that "this is that 'rarest of cases' in which 'the length of a sentence mandated by the Legislature is unconstitutionally excessive.' " (*Baker,* at p. 730.)

*3. Comparison of Punishment for Analogous Crimes in Other States*

Defendant claims that a "mandatory life sentence for violation of section 288.7 is also shown to be excessive punishment by comparison to sentences in other states." He cites the punishment for oral copulation in New York and Oregon. In rejecting the identical claim in *Baker,* the court emphasized that "California and Oregon are not outliers." (*Baker, supra,* 20 Cal.App.5th at p. 731 [citing ten similar statutes in other states].)

"Although California's punishment for orally copulating a child under 10 is no doubt severe, it is not so disproportionate to the punishment imposed in other states to render [defendant's] sentence constitutionally suspect." (*Baker, supra,* 20 Cal.App.5th at p. 731.) Defendant argues his life sentence is cruel and unusual because it is mandatory. But "[t]here can be no serious contention . . . that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.' " (*Harmelin v. Michigan* (1991) 501 U.S. 957, 995 [upholding mandatory life sentence without parole for first-time offender for possession of 672 grams of cocaine]; see *People v. Zepeda* (2001) 87

Cal.App.4th 1183, 1214 [same principle applies to state constitutional challenge].)" (*Baker, supra,* 20 Cal.App.5th at p. 731.)

***D. Federal Constitution***

Having concluded that the sentence does not violate the state Constitution, we may quickly dispense with defendant's Eighth Amendment claim. "There is considerable overlap in the state and federal approaches," and under the Eighth Amendment, we also consider the nature of the offense and offender, the sentences for other crimes in the same jurisdiction, and the sentences imposed for the same crime in other jurisdictions. (*Baker, supra,* 20 Cal.App.5th at p. 733.) Under the federal approach, however, we need not proceed to the other two prongs of the analysis if the "threshold comparison" of " 'the gravity of the offense and the severity of the sentence' " does not create "an ' "inference of gross disproportionality." ' " (*Ibid.*, quoting *Graham v. Florida* (2010) 560 U.S. 48, 60.) As discussed above, the section 288.7, subdivisions (a) and (b) convictions here involved several aggravating factors, including Jane's young age, the number of offenses, and defendant's abuse of a position of trust. For the same reasons, there was no gross disproportionality between defendant's many crimes and the sentence under the Eighth Amendment.

***E. The De Facto Life-Without-Parole Sentence is Not Unconstitutional***

Finally, defendant argues that his 200-year sentence is unconstitutional because it is impossible for any human being to serve. As such, he claims he is serving a de facto life-without-parole sentence. In support, he relies on Justice Mosk's concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, in which the defendant was sentenced to 111 years in prison. (*Id.* at p. 601.) In a concurrence joined by no other justice, Justice Mosk wrote that "[a] sentence of 111 years in prison is impossible for a human being to serve, and therefore violates both the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution and the cruel or unusual punishment clause of article I, section 17 of the California Constitution." (*Id.* at pp. 600–601 (conc. opn. of Mosk, J.).)

Justice Mosk's concurrence, however, is not controlling. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) In any event, we are not persuaded by the analysis. Numerous decisions of the Courts of Appeal have rejected the very argument that defendant makes here and upheld similar sentences against constitutional challenges. (e.g., *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382–1383 (*Byrd*) [upholding sentence of 115 years plus 444 years to life against Eighth Amendment challenge]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1132, 1134–1137 [53 years plus 375 years to life]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531 [129-year sentence for 25 sex crimes against 11-year-old stepdaughter]; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230 [135 years to life for multiple sex offenses involving minors]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 666–667 [283 years and 8 months for violent sexual assaults against seven women].)

That a sentence exceeds a defendant's life expectancy does not necessarily render it unconstitutionally cruel or unusual. (*Byrd, supra,* 89 Cal.App.4th at p. 1383.) "[I]t is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution [citation] or the federal Constitution." (*Ibid.*)

## III. DISPOSITION

The judgment is affirmed.

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BROWN, J.

WE CONCUR:

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STREETER, ACTING P. J.

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TUCHER, J.